

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAREY BRENNAN,

Plaintiff,

vs.

OPUS BANK, a California corporation; and
STEPHEN H. GORDON,

Defendants.

NO. 2:13-cv-00094-RSM

ORDER ON DEFENDANTS'
MOTIONS TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendants Opus Bank and Stephen Gordon's Motions to Dismiss. Dkt. ## 9, 12. Plaintiff Carey Brennan's employment with Opus Bank ended in March 2012. He brought several claims against Opus Bank and its CEO, Stephen Gordon, related to his employment agreement including breach of contract and wrongful termination. Defendants Opus Bank and Gordon moved to dismiss Plaintiff's complaint in favor of arbitration pursuant to a binding arbitration clause. For the reasons that follow, the Court grants Defendants' motions to dismiss in favor of arbitration.

II. BACKGROUND

Defendant Opus Bank is a California-chartered commercial bank that was established on September 30, 2010, following its conversion from Bay Cities National Bank on that same day. Dkt. # 1, ¶ 3.23. Defendant Stephen Gordon was hired as Opus Bank's CEO, while Plaintiff Carey Brennan was hired as Executive Vice President and Managing Director of Corporate Development. *Id.* at ¶ 3.24. Gordon and Brennan, along with three other executives, comprised Opus Bank's senior management team. *Id.*

A. Relevant Provisions of The Employment Agreement

Brennan signed the Opus Bank Employment Agreement ("Employment Agreement") in late September 2010. *Id.* at ¶ 3.33. The Employment Agreement had been approved by the Board of Directors of Opus Bank as well as the Federal Deposit Insurance Corporation (FDIC). *Id.* at ¶¶ 3.31–3.32. The four other members of Opus Bank's senior management team likewise signed their own employment agreements, all of which were written from the same template. *Id.* at ¶¶ 3.26, 3.33; *Id.* at Ex. 1, 5.

Under Section 9(c) of the Employment Agreement, an employee has the right to terminate his employment when that termination is with "good reason." *Id.* at Ex. 4. Section 9(b)(ii) defines "good reason" as including such events as a material change in the Employee's function, duties, or responsibilities with Opus Bank, resulting in substantially lesser responsibility without the consent of the employee. *Id.* Section 9 provides that if Opus Bank fails to fix the problem within 30 days of the employee's Notice of Termination with Good Reason, the employee is entitled to a severance payment and continued benefits for a defined period of time. *Id.*

1 Section 16 of the Employment Agreement (the “Arbitration Clause”), titled
2 “Dispute Resolution Procedures” states that binding arbitration is the sole forum for
3 adjudication of controversies or claims (except those for equitable relief) arising out of the
4 Employment Agreement or the employee’s employment or termination of employment with
5 Opus Bank. *Id.* at ¶ 3.3; *Id.* at Ex. 4. Section 16 also states that such claims shall be settled
6 by binding arbitration in accordance with the Rules of the American Arbitration
7 Association. *Id.* at Ex. 4.

9 **B. The Events Leading Up to Brennan’s Exit from the Company; Brennan’s Exit**

10 As of March 2012, Brennan had doubts about the basis on which Opus Bank was
11 making statements to potential stock purchasers about Opus Bank’s projected results. *Id.* at
12 ¶ 3.85. Brennan also felt he was being excluded from activities he had been hired to
13 perform. *Id.* at ¶ 3.114. For example, there was a dispute as to the handling of an
14 employment matter concerning Jan Schrag, a Senior Vice President, whose termination of
15 employment resulted in her bringing a wrongful termination claim against Opus Bank that
16 was later settled. *Id.* at ¶¶ 3.101–3.114.

17 Brennan voiced his concerns via email to other members of the senior management
18 team (not including Gordon) and their outside counsel about potentially misleading or
19 inaccurate facts being communicated to potential investors. *Id.* at ¶¶ 3.86–3.93. A chain of
20 emails among Gordon, Brennan, and Donald Royer, Opus Bank’s general counsel, were
21 exchanged. *Id.* at ¶¶ 3.98.

22 On March 19, 2012, Brennan sent Gordon and the other members of the Board of
23 Directors a notice of Termination with Good Reason. *Id.* at ¶ 3.119. Brennan claimed that
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1 the “scope and significance” of his duties had “materially eroded” without his consent, and
2 that his duties had “materially changed and diminished.” *Id.*

3 Opus Bank responded through Royer, who asserted that Brennan did not have “good
4 reason” to terminate his own employment, and notified Brennan that he had been placed on
5 “administrative investigatory suspension.” *Id.* at ¶ 3.124. An independent investigation—
6 the neutrality of which Brennan disputes—was conducted by attorney Thomas Klein. *Id.* at
7 ¶¶ 3.125–3.127. Klein concluded that Brennan did not have good reason to terminate his
8 employment, nor did Opus Bank have cause to terminate Brennan’s employment. *Id.* at ¶
9 3.128. Opus Bank accepted these findings, and notified Brennan that the Board was now
10 recognizing his “voluntary resignation” from Opus Bank without “good reason.” *Id.* at ¶
11 3.129.
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14 Brennan then filed a complaint against Opus Bank and Gordon, alleging breach of
15 contract, breach of the implied covenant of good faith and fair dealing, tortious wrongful
16 termination in violation of public policy, and violations of California and Washington state
17 law. Opus Bank moved to dismiss the complaint in favor of binding arbitration pursuant to
18 Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction), 12(b)(3) (improper venue),
19 12(b)(6) (failure to state a claim), the Federal Arbitration Act (“FAA”), and Brennan’s
20 undisputed agreement to arbitrate pursuant to the rules of the American Arbitration
21 Association (“AAA”). Defendant Gordon moved to dismiss the complaint under Fed. R.
22 Civ. P. 12(b)(2) for lack of personal jurisdiction, or in the alternative for the same reasons
23 presented by Opus Bank: namely, lack of subject matter jurisdiction and improper venue
24 given Brennan’s agreement to resolve all claims through binding arbitration. In the event
25 the Court does not dismiss Brennan’s complaint without prejudice, both Defendants request
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1 that the Court order a stay of this action until arbitration is conducted and concluded.
2 Brennan challenges the validity of the Arbitration Clause. He contends that this Court, and
3 not the arbitrator, must determine whether the Arbitration Clause is unconscionable. As
4 discussed below, the Court finds that dismissal under Rule 12(b)(3) in favor of arbitration is
5 warranted.

7 **III. DISCUSSION**

8 **A. Legal Standard**

9 Federal Rule of Civil Procedure 12(b)(3) provides for dismissal based on improper
10 venue. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). “An agreement
11 to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection
12 clause that posits not only the situs of suit but also the procedure to be used in resolving the
13 dispute.” *Scherk v. Alberto-Culver*, 417 U.S. 506, 519 (1974). Motions to enforce forum
14 selection clauses may be brought under Rule 12(b)(3). *Argueta*, 87 F.3d at 324. When a
15 motion to enforce a forum selection clause is brought, the plaintiff carries the burden of
16 showing that venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d
17 491, 496 (9th Cir. 1979). Further, “[u]nder the . . . standard for resolving motions to
18 dismiss based on a forum selection clause, the pleadings are not accepted as true, as would
19 be required under a Rule 12(b)(6) analysis.” *Argueta*, 87 F.3d at 324.

22 **B. Analysis**

23 When the FAA governs a contract, federal law controls the issue of arbitrability and
24 preempts conflicting state law. *Southland Corp.*, 465 U.S. at 12, 15–16 (1984) (“Federal
25 law in the terms of the [FAA] governs that issue [of arbitrability] in either state or federal
26 court.”). Plaintiff appears to argue that the employment agreement is subject to both the

1 FAA and the California Arbitration Act. Dkt. # 28, p. 6. Because the FAA in fact preempts
2 state law, it is an important preliminary matter to determine whether the FAA governs this
3 employment agreement. The Court turns first to the issue of preemption and then to the
4 issue of arbitrability.

5 1. Preemption

6 The FAA widely compels judicial enforcement of written arbitration agreements.
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8 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Enacted in response to the
9 historical hostility of American courts toward arbitration agreements, *id.*, the FAA is broad
10 in its scope: it governs all arbitration contracts that “evidenc[e] a transaction involving
11 [interstate] commerce.” Federal Arbitration Act, 9 U.S.C. § 2 [hereinafter FAA]. This
12 threshold is met when a contract “affect[s] commerce” or concerns a transaction that
13 ultimately involves interstate commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513
14 U.S. 265, 277 (1995).

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16 The Supreme Court interprets the language of the FAA as an expression of
17 “Congress’ intent to ‘exercise [its] commerce power to the full.’” *Circuit City*, 532 U.S. at
18 115 (quoting *Allied-Bruce*, 513 U.S. at 277). Parties need not have contemplated that the
19 agreement would have an effect on interstate commerce at the time it was formed, so long
20 as the contract does, in fact, affect interstate commerce. *Allied-Bruce*, 513 at 278. In
21 addition, the scope of the FAA is not limited to commercial contracts; it covers
22 employment contracts as well. *See Circuit City*, 532 U.S. at 119 (holding that FAA § 1,
23 which excludes “contracts of employment of seamen, railroad employees, or any other class
24 of workers engaged in foreign or interstate commerce,” is properly interpreted to exclude
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1 from the FAA only employment contracts for transportation workers, not all employment
2 contracts).

3 The contract between Defendant Opus Bank and Brennan is governed by the FAA
4 because it is a non-transportation employment contract that involves and affects interstate
5 commerce. Opus Bank is a California-chartered company that was established with the
6 “vision” to become a “diversified super regional community bank” located in the Western
7 region (California, Arizona, Nevada, Oregon, and Washington). Dkt. # 1, ¶¶ 3.11, 3.17.
8 Plaintiff is a Washington resident. Dkt. # 1, Ex. 4. In the contract, the parties state that
9 Brennan would reside in Washington and be compensated by Opus Bank for expenses
10 resulting from his travel between Washington and his “place of work” in California. *Id.*

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12 In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967), the
13 Supreme Court held that a “consulting agreement” between a Maryland company and a
14 New Jersey company wherein the New Jersey company was to “furnish advise and
15 consultation” to the Maryland company, “clear[ly]” evidenced a transaction in interstate
16 commerce. *Id.* at 397, 401. An agreement between a California company and a Washington
17 resident wherein the Washington resident agrees to serve as an Executive Vice President for
18 the California company similarly evidences such a transaction. *See also Circuit City*, 532
19 U.S. at 109–110 (finding the FAA governs an arbitration agreement between a Circuit City
20 employee in California and Circuit City). This employment agreement satisfies the
21 “interstate commerce” requirement of the FAA. Thus, the FAA governs this agreement.
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24 2. Arbitrability

25 Whether a dispute as to arbitrability should be resolved by the court or an arbitrator
26 depends upon whether the parties agreed to delegate that power to the arbitrator. *First*

1 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995). Unless parties “clearly
2 and unmistakably” delegate that power to an arbitrator, arbitrability is for the court, not the
3 arbitrator, to decide. *Id.* at 944; *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S.
4 643, 649 (1986). The requirement of a clear statement means that silence or ambiguity as to
5 the delegation of arbitrability is resolved in favor of court adjudication, in contrast to the
6 general rule that ambiguities in arbitration agreements be resolved in favor of arbitration.
7 *First Options*, 514 U.S. at 94–95.

9 Defendants contend that the employment agreement contains a clear and
10 unmistakable agreement to delegate the question of arbitrability to the arbitrator.
11 Specifically, Defendants point to the portion of the Arbitration Clause that states that “any
12 controversy or claim...shall be settled by binding arbitration in accordance with the Rules
13 of the American Arbitration Association.” Dkt. # 1, Ex. 4. The American Arbitration
14 Association (“AAA”) Employment Arbitration Rules and Mediation Procedures state that
15 “[t]he arbitrator shall have the power to *rule on his or her own jurisdiction*, including any
16 objections with respect to the existence, scope or *validity* of the arbitration agreement.” Dkt.
17 # 1, Ex. 3 (emphasis added). Defendants argue that the incorporation of AAA rules, which
18 explicitly delegate arbitrability questions to the arbitrator, constitutes a “clear[] and
19 unmistakabl[e]” agreement between the parties.

22 Brennan, on the other hand, argues that the employment agreement does not clearly
23 delegate the question of arbitrability to the arbitrator. He points to the “clear and
24 unmistakable” delegation provision in *Rent-A-Center, West, Inc. v. Jackson*, _U.S._, 130 S.
25 Ct. 2772 (2010), to support his argument that the delegation provision in the instant case
26 falls short. Dkt. # 28, p. 7. Plaintiff is correct to note that the agreement in *Rent-A-Center*

1 included explicit language giving the arbitrator “exclusive authority” to resolve disputes as
2 to the enforceability of the agreement, while the text of the agreement between Plaintiff and
3 Defendant Opus Bank includes no such language. *See Rent-A-Center*, 130 S. Ct. at 2775.

4 The Ninth Circuit has not held in a published opinion that incorporating the AAA
5 rules into an employment agreement constitutes a “clear and unmistakable” delegation.
6 However, nearly every circuit to address the issue has concluded that this type of
7 incorporation of AAA rules is a clear expression of delegation to the arbitrator. For
8 example, the Eighth Circuit determined that an arbitration clause that stated “[a]ny
9 controversy or claim . . . shall be settled . . . in accordance with the Commercial Rules of
10 the American Arbitration Association . . .” is a “clear and unmistakable” delegation of
11 arbitrability to the arbitrator, as is established by AAA Rule 7(a), which gives the arbitrator
12 “the power to rule on his or her own jurisdiction.” *Fallo v. High-Tech Inst.*, 559 F.3d 874,
13 877–79 (8th Cir. 2009). Likewise, the Eleventh Circuit determined that language stating
14 “arbitration shall be conducted in accordance with . . . the American Arbitration
15 Association” clearly delegated the question of jurisdiction to the arbitrator, in accordance
16 with AAA rules. *Terminix Intern. Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d
17 1327, 1332 (11th Cir. 2005). *See also Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d
18 205 (2d Cir. 2005) (agreement to settle dispute “in accordance with the Commercial
19 Arbitration Rules of the American Arbitration Association” was “clear and unmistakable”
20 delegation of arbitrability to arbitrator); *but see Riley Mfg. Co., Inc. v. Anchor Glass*
21 *Container Corp.*, 157 F.3d 775, 777 (10th Cir. 1998) (agreement to settle dispute “in
22 accordance with the Commercial Arbitration Rules of the American Arbitration
23 Association” was not a “clear and unmistakable” delegation of arbitrability to arbitrator).

1 In addition, though no published Ninth Circuit decisions speak to this issue,
2 unpublished decisions by the Ninth Circuit and district courts in the Ninth Circuit are in line
3 with the considerable majority of circuits: they find incorporation of AAA rules to be a
4 clear and unmistakable delegation of arbitrability to arbitrators. *See Ariza v. Autonation,*
5 *Inc.*, 317 F. App'x 662, 664 (9th Cir. 2009); *Aceves v. Autonation, Inc.*, 317 F. App'x 665,
6 666–67 (9th Cir. 2009); *see, e.g., Jeld-Wen Master Welfare Benefit Plan v. Tri-City Health*
7 *Care District*, No. 12CV197-GPC(RBB), 2012 WL 59444215, at *7 (S.D. Cal. Nov. 27,
8 2012) (“[B]ased on the parties agreeing to the rules under the AAA, the parties intended
9 that the issue of arbitrability be decided by the arbitrator.”).

11 Although Brennan identifies additional cases to support his argument that the Opus
12 Bank agreement does not delegate arbitrability, these cases are unpersuasive. Plaintiff
13 identifies California state court decisions suggesting (but not holding) that the incorporation
14 of AAA rules is insufficient to establish “clear and unmistakable” delegation, *see Ajamian*
15 *v. CantorC02e, L.P.*, 203 Cal. App. 4th 771, 790 (Cal. Ct. App., 2012). However, the FAA
16 preempts state law on the issue of arbitrability. Thus, California state law is of little
17 relevance to this issue.

19 The favored approach among circuit courts is to interpret the incorporation of AAA
20 rules as a “clear and unmistakable” delegation of the question of arbitrability to the
21 arbitrator. The Court therefore adopts this approach.

23 **a. Brennan’s Challenge to the Arbitration Clause**

24 Having found that the incorporation of AAA rules into the employment agreement
25 constituted a clear and unmistakable delegation to the arbitrator, the Court must next
26 address whether it or the arbitrator should decide Brennan’s claim that the Arbitration

1 Clause is unconscionable. Plaintiff does not dispute that *Rent-A-Center* controls the
 2 question of whether his claims are properly before this court or an arbitrator. Dkt. # 16, p. 9.
 3 However, Plaintiff misapplies the case. Plaintiff contends that *Rent-A-Center* distinguishes
 4 between two types of challenges: challenges to an arbitration agreement, and challenges to
 5 an entire agreement (i.e. an agreement which includes an arbitration clause) as a whole.
 6 This is incorrect.¹ The Supreme Court in *Rent-A-Center* in fact distinguishes between two
 7 other types of challenges: challenges to the validity of the *delegation provision*, and
 8 challenges to the *arbitration agreement* as a whole. 130 S. Ct. at 2779. It is only when a
 9 party challenges the delegation provision itself that the district court intervenes. *Rent-A-*
 10 *Center*, 130 S. Ct. at 2778-79. (“[w]e require the basis of challenge to be directed
 11 specifically to the agreement to arbitrate before the court will intervene Unless [a
 12 party] challenged the delegation provision specifically, we must treat it as valid . . . and
 13 enforce it . . . leaving any challenge to the validity of the agreement as a whole for the
 14 arbitrator”).

17 That Plaintiff has misapplied *Rent-A-Center* is further illustrated by his reliance on
 18 the Ninth Circuit’s decision in *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir.
 19 2006). Dkt. 36 at 10. In *Nagrampa*, the Ninth Circuit (rather than the arbitrator) heard a
 20 plaintiff’s unconscionability claim as to the arbitration provision within a franchise
 21 agreement. 469 F.3d at 1263. Plaintiff argues that *Nagrampa* establishes precedent for this
 22 Court to do the same. Dkt. # 36, p. 10. However, as Defendant Opus Bank notes, neither
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26 ¹ Notably, the Supreme Court has distinguished between these two types of challenges in other cases. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the [entire] contract’s validity is considered by the arbitrator in the first instance.”) However, in *Buckeye*, the Court was not addressing a question of whether the arbitration agreement delegated questions of arbitrability to the arbitrator. This key difference makes *Buckeye* inapposite to the instant case.

1 party in *Nagrampa* was arguing that they had delegated the arbitrability question to the
2 arbitrator. Dkt. # 24, p. 6.

3 Plaintiff mistakenly believes that, in order to have his dispute in front of the court
4 rather than an arbitrator, he must argue that he is challenging just the arbitration agreement
5 as unconscionable and not the entire employment agreement. In fact, he would need to
6 challenge delegation of the power to determine validity of the arbitration clause as
7 unconscionable, and not the entire arbitration agreement in order to be properly in front of
8 the court. But, in Plaintiff's own words, he states that he is challenging the entire arbitration
9 agreement. Dkt. # 28, p. 2 ("[w]hen properly construed, Section 16 [(the arbitration clause)]
10 . . . is so pervaded by unconscionability as to be unenforceable in its entirety"); *see* Dkt. #
11 16, p. 9 ("Brennan does not challenge the Brennan Employment Agreement in its entirety . .
12 . he is only challenging the arbitration requirement."); Dkt. # 36, p. 10 ("[the arbitration
13 clause] is unenforceable, and should be severed from the otherwise valid Employment
14 Agreement.").

15 The Supreme Court in *Rent-A-Center* is clear: if a party challenges the validity of
16 the delegation provision itself, the court must hear that challenge. 130 S. Ct. at 2778. If a
17 party challenges the validity of the arbitration agreement as a whole, only the arbitrator may
18 hear that challenge. *Rent-A-Center*, 130 S. Ct. at 2779. There, the respondent argued
19 procedural and substantive unconscionability as to the entire agreement to arbitrate. *Id.* at
20 2780. The Supreme Court decided that it need not consider such claims because none of
21 respondent's unconscionability challenges were specific to the delegation provision. *See id.*
22 The same is true here. Brennan challenges the entire arbitration clause as unconscionable.
23 He does not allege that the incorporation of the AAA rules, which delegates the threshold
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1 issue of validity to the arbitrator, was procedurally or substantively unconscionable.

2 Accordingly, Plaintiff's challenge must be heard by the arbitrator.

3 **b. Opus Bank CEO Stephen Gordon**

4 In addition to the claims Brennan alleged against Opus Bank, he has brought a
5 separate claim against Stephen Gordon for violation of RCW 49.48.010. That statute
6 requires an employer to pay employees who have been discharged or have voluntarily
7 withdrawn from employment all wages due to him or her at the end of the established pay
8 period. RCW 49.48.010.

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10 Here, the arbitration agreement is broad in scope: it provides that "any controversy
11 or claim arising out of this Agreement *or the Employee's employment with the bank or the*
12 *termination thereof* . . . shall be settled by binding arbitration . . ." Dkt. # 9, p. 12 (emphasis
13 added). Brennan's claim for failure to pay wages due requires first a finding that there
14 were, in fact, wages due. The determination of whether Plaintiff is entitled to wages is at
15 the heart of the dispute over the employment agreement. Plaintiff's claim against Gordon
16 thus "aris[es] out of" Plaintiff's employment with and termination from Opus Bank, and is
17 subject to the arbitration provision.
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20 Under Ninth Circuit precedent, this Court has the discretion to decide whether to
21 dismiss or stay pending arbitration in this case. *See Sparling v. Hoffman Const. Co., Inc.*,
22 864 F.2d 635, 636, 639 (9th Cir. 1988) (finding that a district court acted within its
23 discretion when it dismissed a party's claims, rather than stayed them). Because the Court
24 finds that arbitration is the proper forum for Brennan's claims to be heard, it shall grant the
25 motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(3) in favor of arbitration, and without
26 prejudice.

IV. CONCLUSION

Having considered the motions, the responses and replies thereto, the attached declarations and exhibits, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Defendants' Motions to Dismiss (Dkt. ## 9, 12) are GRANTED in favor of arbitration and without prejudice;

(2) The Clerk is directed to send a copy of this Order to all counsel of record.

DATED: June 5, 2013.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE